Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	File Nos. BMPCT-910625KP
	)	and BTCCT-911129KT
For Extension of Construction Permit	)	
and for Consent to the Transfer of	)	
Control of the Permittee of	)	
Station WRBW(TV), Orlando, Florida	)	

TO: The Commission

REPLY OF PRESS BROADCASTING COMPANY, INC. TO "RAINBOW OPPOSITION TO PRESS CONTINGENT APPLICATION FOR REVIEW"

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September 21, 1993

1. Pursuant to Section 1.115(d) of the Rules, Press Broadcasting Company, Inc. ("Press") hereby replies to the Opposition of Rainbow Broadcasting Company ("Rainbow") to the "Contingent Application for Review" filed by Press on August 26, 1993 with respect to the above-captioned applications.

2. In keeping with its pattern of attempting to distract attention from its own misconduct, Rainbow again argues that Press does not have standing to challenge Rainbow's applications. But Press is the licensee of Station WKCF(TV), Clermont, Florida, which serves the Orlando ADI, operating from the very transmitter site specified in Rainbow's construction permit. As Press has repeatedly noted [1/], Station WKCF(TV) would compete for audience and revenues with Rainbow's station, if Rainbow were ever to construct and operate. Thus, Press has standing to oppose Rainbow's applications. *See, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476 (1940); *Naguabo Broadcasting Company*, 6 FCC Rcd 912, 920, ¶36 (Rev. Bd. 1991) ("the potential of economic injury is a prime basis for legal standing to take a position in a broadcast proceeding, and profoundly legitimate").

3. Rainbow itself has expressly conceded Press' interest here. In its Opposition to Press' "Emergency Petition" (filed August 13, 1993), Rainbow specifically acknowledged that Press "would be competitively benefitted by preventing Rainbow's [station] from operating in the market." Rainbow Opposition to Press Emergency Petition at 2. Nevertheless, Rainbow seems to say that, because some of Press' pleadings were titled as "informal objections", Press is precluded from seeking reconsideration or review. *See* Rainbow Opp. at 6. But reconsideration and review (including judicial review) are available to "any person aggrieved", without regard to the particular pleading title which may have been used by the person asserting standing. *See* 47 U.S.C. §§5(c)(4), 402(b)(6); 47 C.F.R. §§1.115(a), 1.106(b)(1). Because Press has, since its first pleading in this matter, consistently demonstrated that it

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[1/] Rainbow asserts that Press has never asserted that it has standing to oppose Rainbow's applications. *See* Rainbow Opp. at 5-6 ("Press does not here claim aggrievement; nor has it ever done so, never having been anything but an informal objector" [footnotes omitted]). That is inaccurate: Press disclosed its particular economic interest relative to Rainbow in its very first pleading in this matter in February, 1991, and has done so repeatedly since. *E.g.*, Press' Informal Objection (filed 2/15/91) at n.2; Press' Reply to Opposition (filed 3/21/91) at 1, ¶2; Press' Informal Objection and Request to Hold Application in Abeyance (filed 1/7/92) at 1-2, ¶2.

would be "aggrieved" by grant of Rainbow's application(s), and since even Rainbow has conceded the nature of Press' competitive interest, Press' standing cannot legitimately be denied.

4. Rainbow's standing argument appears to be based on the notion that, since a person does not have to demonstrate "aggrievement" as a condition to the filing of an informal objection, an informal objector can never be said to be "aggrieved" for standing purposes. *See* Rainbow Opp. at 6-7. But that "analysis" is wrong: a clearly aggrieved person (such as Press in this case) may, for various reasons, title its pleading an "informal objection". [2/] The choice of title does not in any way undermine or alter the nature and extent of aggrievement, and can therefore ***not*** deprive the pleader of standing pursuant to Sections 5, 402 and 405 of the Act. [3/]

5. To the very limited extent that Rainbow addresses, largely in passing, the substantive issues raised by Press, Rainbow's claims are equally unavailing, based as they are on (a) misstatements of Press' arguments, (b) misstatements of the law, and (c) Rainbow's continued inability or unwillingness to get its own facts straight. [4/]

[2/] For example, as Press explained in its February 15, 1991 Informal Objection, Press would ordinarily have titled that pleading a "petition to deny", but for the fact that the Commission's rules do not provide for the filing of pleadings with that title in connection with applications filed on FCC Form 307. *See* Press Informal Objection (filed February 15, 1991) at n. 1. Notwithstanding the title given to the pleading, Press still offered a showing of the nature of its aggrievement. *Id.* at n. 2. And, of course, immediately after that first Informal Objection was filed, Press filed a "formal" Petition for Reconsideration (on February 25, 1991).

[3/] Rainbow's citations of *Montgomery County Broadcasting Corp.*, 65 F.C.C. 2d 876, 41 R.R.2d 470 (1977) and *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), are mystifying because both of those cases support Press here. In *Montgomery County*, the Commission expressly held that, where good reason exists for failure to participate prior to grant, the filing of a petition for reconsideration is appropriate. In the instant case Press has such a good reason. Press did not participate prior to the grant of Rainbow's January, 1991 extension application because -- as Press has repeatedly demonstrated -- Press ***could not have so participated***: the Commission's first public notice reflecting the pendency of that application was released on the very day that that application was granted, thereby absolutely precluding any pre-grant objections.

In *Garden State*, the Court stated that "Section 402 of the [Communications] Act authorizes any person who is 'aggrieved or whose interests are adversely affected by any order of the Commission granting or denying' a licensing application to appeal to this court." 996 F.2d at 395. Since Press is, in fact, "aggrieved" or "adversely affected" by grant of Rainbow's applications (as opposed to denial of those applications and cancellation of Rainbow's permit), Press clearly has standing.

[4/] In an attack which is related neither to Press' standing nor to the actual substantive merits here at issue, Rainbow asserts that Press' supposedly "hysterical" efforts against Rainbow are motivated by some concern on

(continued...)

6. Rainbow claims that, according to Press, Rainbow was "obligated" to build its station while judicial review of the grant of its permit was still pending. Rainbow Opp. at 9. That is not Press' position. Press believes that Rainbow ***could*** have built during that period. Moreover, even if Rainbow elected not to build then, it could and should at least have taken advantage of that time to make its plans for construction, so that it would be ready to build if its grant were affirmed. After all, Section 73.3534 reflects the Commission's insistence that, even if they cannot complete construction in a timely manner, permittees should make diligent and continued progress toward construction. Here, Rainbow had not only made ***NO*** progress during the first five years that it held the permit, but it also made ***NO*** progress during the next three years following finality of its permit (the only arguable exception being construction, in mid-1991, of a transmitter room which, at least two years later, remained vacant and without even full electrical service, *see* Press' Contingent Application for Review at n.13). In the face of such a clear demonstration of the permittee's lack of diligence, Section 73.3534 of the rules and the cases decided thereunder simply do not provide for further extension of a permit. [5/]

[4/](...continued)
Press' part that it might be forced to abandon its position on its current tower if "that were required by a settlement of the *Rey v. Gannett* action". Rainbow Opp. at 2. But the Addendum to Lease Agreement attached to Rainbow's pleading ***at most*** demonstrates Press' willingness to work with the tower owner in the event that the owner were to be required, by a court order, to relocate Press. For the reasons stated by Judge Marcus (who denied Rainbow's request for an injunction against the tower owner), the likelihood of any such court-ordered relocation is virtually zero. A copy of Judge Marcus' opinion has previously been submitted to the Commission by Press. Press is also constrained to note that the Addendum does ***not*** reflect that any relocation of Press could be imposed based on a "settlement", as Rainbow alleges -- indeed, to the contrary, the Addendum reflects that Press was advised that the tower owner "will not agree to any compromise with Rainbow". Addendum at 2.

In a similar vein, Rainbow also continues its tired claims that Press is guilty of some harassment against Rainbow. *E.g.*, Rainbow Opp. at n. 9. The most obvious response to this charge is that it flies in the face of the decision of the Chief, Video Services Division, which concluded that, as alleged by Press, Rainbow was not entitled to any extension of its permit. That is, the Video Services Division decision demonstrates that, at least in the Division's official view, Press' arguments were not only valid, but also that they should prevail! It is hard to see how the advancement of meritorious arguments could be legitimately deemed harassment.

[5/] Press notes for the record that, in its Opposition, Rainbow has elected not to address the specific language of Section 73.3534, despite the fact that that rule governs this case. Similarly, Rainbow has elected not to address the multiple cases decided under Section 73.3534 which were cited by Press in its Application for Review. And while Rainbow does cite *Community Service Broadcasting, Inc.*, 8 FCC Rcd 5044 (1993), for the proposition that "Rainbow was entitled to a normal two year construction period after final grant", that case does ***not*** in fact so hold, as even a cursory review of the opinion will reveal.

7. With respect to its "legal" arguments, Rainbow claims that the Bureau Chief's July 30, 1993 action adequately addresses the issues raised by Press. Rainbow Opp. at 9. But it is indisputable that Press is entitled to a rational, non-arbitrary, non-capricious decision which is consistent with existing agency rules, regulations and decisions. And if the agency decides to change its policies, it must explain the basis for that change. In this case Press demonstrated that grant of Rainbow's applications would be plainly inconsistent with well-established Commission rules, policies and precedent. The Bureau Chief's decision does not in any way explain why those rules, policies and precedent -- including the Video Service Division's own ruling in favor of Press -- do not correctly control this case. Further, the Bureau Chief's action virtually ignored the issues raised by Press' request for evidentiary hearing. Such a cursory, non-analytical approach is inconsistent with Section 309(d) of the Communications Act. *See, e.g., Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

8. Finally, even in its Opposition Rainbow can't quite get its facts straight. For example, Rainbow insists that Rainbow was "held in limbo" by Press' objections. Rainbow Opp. at 4. But in its June 25, 1991 [6] extension application -- *i.e., **AFTER*** Press had filed its first objection in February, 1991, and while that objection was still pending -- Rainbow unequivocally and expressly advised the Commission that Rainbow intended to proceed with construction and would have the station in operation by December 31, 1992. [7] Such a commitment belies any notion that Rainbow felt itself "held in limbo". In view of Rainbow's voluntary commitment, which Rainbow did not modify in any way for almost two years, it is difficult to take this *post hoc* "held in limbo" complaint seriously.

9. The same is true of Rainbow's complaints about the Commission's inaction on Rainbow's

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[6] At Footnote 11 to its Opposition, Rainbow refers to "From [sic] 307 filed June 6, 1991". Press takes this to be a reference to Rainbow's June, 1991 extension application. But that application was not filed until June 25, 1991, according to the "received" stamp placed on that application by the Commission's Mellon Bank fee operation.

[7] Of course, Rainbow had told the District Court, under oath, in January, 1991 that Rainbow could not and would not construct if Press were to commence operation from their common tower site. *See, e.g.*, Sworn Statement of Susan D. Harrison, submitted to District Court as Exhibit B to Rainbow's Complaint and specifically incorporated by reference at page 9 of the Complaint, at 1 (if Press commences operation from the tower, "Rainbow will be unable to secure financing to build and operate the station. . . . [T]he station will never be built.").

applications. While Rainbow would ***now*** have the Commission believe that such inaction absolutely barred Rainbow from moving forward, Rainbow failed at any time prior to April, 1993 even to suggest that construction was in any way being impeded. Again, it is hard to take Rainbow's complaints seriously when Rainbow itself did not make them known at any earlier time.

10. And those complaints do not in any event help Rainbow here. Rainbow has consistently asserted (to the Commission, at least [8/]) that it has consistently been fully qualified (including financially qualified) to construct and operate. But its latter-day claim is now that, absent an assignment of the permit in order to infuse capital into the permittee, Rainbow has been ***UNABLE*** to construct. Those two representations are diametrically inconsistent: either Rainbow has been qualified to construct, or it has not been. Press believes that Rainbow's failure to construct demonstrates its lack of financial qualifications, and Rainbow's professed inability to construct absent grant of its assignment application is nothing less than an express admission of that lack of qualifications.

11. Rainbow's Opposition thus adds nothing of substance. To the contrary, it constitutes merely the latest example of Rainbow's unwillingness or inability to address the serious factual and legal issues here.

Respectfully submitted,

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[8/] As Press has previously noted, and as the Commission may determine for itself, Rainbow itself alleged, under oath, in the Miami District Court proceeding that Rainbow was ***NOT*** financially qualified. *See* Rainbow's Complaint in the District Court case, a copy of which has previously been submitted to the Commission by Press.

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 21st day of September, 1993, I have caused copies of the foregoing "Reply of Press Broadcasting Company, Inc. to "Rainbow Opposition to Press Contingent Application for Review" to be hand delivered (as indicated below) or placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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